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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Written statement* submitted by the International Service for Human Rights, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

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* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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From restriction to protection: the legal environment for human rights defenders and the need for national laws to protect and promote their work

This statement is based on legal research across all regions, together with face-to-face consultations with over 150 human rights defenders (HRDs) from more than 60 States and sets out the need for States to enact specific laws to protect and support HRDs and to review and amend laws that restrict and criminalise their work. It also contains recommendations in that regard.

Specific national laws on HRDs

States should develop and implement specific laws and policies in this regard. Recommendations and reports by independent experts,[1] United Nations bodies,[2] and regional human rights mechanisms in Africa[3] and the Americas reflect this.[4] It is also recognised by States, through the UPR,[5] and through emerging State practice.[6]

In some jurisdictions, human rights in general enjoy a high level of recognition and protection (constitution or legislative instrument of general application). Often, such States see specific legal recognition and protection of HRDs as unnecessary, an approach that is incompatible with empirical evidence.[7] This makes the adoption of defender laws critically important, even in those jurisdictions with an existing level of legal protection of human rights in general terms.[8]

Key issues arising from the consultations

Protection against stigmatisation, intimidation and reprisals

The right to be free from reprisals is enshrined in the Declaration, and is an aspect of the protection afforded by other international human rights.[9]

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[1] Report of the Special Rapporteur on the situation of human rights defenders, UN Doc A/HRC/25/55

[2] Summary of the Human Rights Council panel discussion on the importance of the promotion and protection of civil society space, UN Doc A/HRC/27/33, para 71.

[3] African Commission on Human and Peoples' Rights Resolution ACHPR/Res.196 on Human Rights Defenders in Africa (2011).

[4] Inter-American Commission on Human Rights Resolution on Human Rights Defenders of 27 May 2014

[5] During UPR 18th session (January 2014) 18 states made recommendations to incorporate the Declaration on Human Rights Defenders at the national level or strengthen an existing law in that regard.

[6] With specific human rights defender laws enacted in Colombia, Côte d'Ivoire and Mexico and progressing through official legislative processes in Burkina Faso, Honduras and the Philippines.

[7] Specific laws can have particular normative, expressive and educative functions that cannot be achieved through laws of general application. HRDs identified the legitimating and protective function of specific legislation on defending rights. Specific laws on HRDs assist to provide formal legal protection to their work, and to give official recognition to the legitimacy of such work, educate law enforcement officers, public officials and the public at large about the importance of defenders' work and the protection thereof. Ibid pg. 15

[8] And where it may be assumed that HRDs may not face the same risks or repression as elsewhere.

[9] Such as freedom of expression and association; freedom from arbitrary arrest, detention or deprivation of liberty; torture; cruel, inhuman and degrading treatment; and arbitrary deprivation of life. Ibid pg. 19

Most consultations reflected routine State and non-state attacks against HRDs, including arbitrary detention, kidnapping, disappearances, torture, executions, and routine surveillance of HRDs, both online and offline, in the workplace, public spaces and at home.

HRDs identified a worsening trend of attacks by non-State actors, particularly extremist religious groups, terrorist organisations, and armed militias, in some States and frequent reprisals against HRDs who cooperate or seek to cooperate with the UN human rights mechanisms.

Protection for particularly vulnerable groups of human rights defenders

Certain groups of HRDs are particularly vulnerable because of the nature of their work or their identities.[10]

States have a positive duty to protect HRDs against such risks, including through the adoption of specific legislative measures.[11] However, only few States have enacted laws of general application that contain specific provisions to enhance protection for groups of HRDs at particular risk or, have established in law protection programs for particular groups at risk in association with their work.

Root causes

HRDs shared with ISHR the lack of specific legislation protecting human rights defenders, including deficient protection for community rights (land, natural resources) and against enforced disappearance and the lack or weak national human rights protection mechanisms, including absent, weak or not independent national human rights institutions (NHRIs) which fail to properly protect HRDs, have limited understanding of human rights defenders, are overly bureaucratic, or fail to implement their mandates.

Impunity against HRDs

HRDs also mentioned the very high level of impunity for attacks against HRDs, with investigations not carried out promptly, thoroughly or at all, with impunity exacerbated by the lack of independent judiciary and weak rule of law in many States and the extensive use of pre-charge and pre-trial detention, often without adequate access to a lawyer or judicial review.

Defenders emphasised the weak judiciary in many of the countries, including politically motivated or corrupt court systems, high barriers to access the legal system and the absence of legal aid, low priority given to HRDs cases, and lack of witness protection.

Lacking implementation

Some States have led the way in enacting specific laws and policies for the recognition and protection of human rights defenders. ISHR is concerned by reports from HRDs who have found that whilst those measures are strong on paper, their impact is limited through lack of implementation.

Research and consultations show that laws or policies tend to focus on the protection of HRDs who are already at risk, and tend to only focus on protection mechanisms, with a lack of attention to measures that would contribute to creating

[10] The Special Rapporteur identifies several groups, including: women human rights defenders; those working on issues of sexual orientation and gender identity; journalists and media workers; HRDs who work with indigenous communities or with land and environment rights and on issues of corporate accountability; HRDs who work on issues of corruption and impunity; and HRDs who work on cases of torture and enforced disappearances. Report of the Special Rapporteur on the situation of human rights defenders, UN Doc A/HRC/19/55 (2011)

[11] 'Protecting women human rights defenders', UN Doc A/Res/68/181 (2013)

an enabling environment for defenders, play a preventative role, or promote accountability and combat impunity for attacks and other violations.[12]

Common criticisms by HRDs are of a lack of adequate human and financial resources, inadequate analysis of the risks facing defenders, a lack of sensitivity to the specific needs of defenders, a lack of coordination across different levels of government, a privatisation of security measures, and –a lack of political will in implementing human rights defender policies.

Where HRD laws and policies exist it is vital that the highest levels government guarantee their effective implementation, ensuring adequate resourcing and transparent monitoring and evaluation of their effectiveness.

Reform existing laws to protect HRDs

In addition to enacting specific laws on the recognition and protection of HRDs, States must review and amend existing legislation, including in the following areas:

Establishment and operation of human rights and non-governmental organisations

ISHR's research and consultations show a worsening trend of restrictions on the establishment, operation, activities, governance and access to resources for NGOs, notwithstanding protection under international law of the right to form independent associations and the right of such associations to access and receive funding and resources for the purpose of promoting and protecting human rights.[13]

Laws supporting the right to peaceful assembly and protest

The exercise of the right to peaceful assembly, including through participation in peaceful protests, is an important and legitimate aspect of the work of human rights defenders, [14] and it enjoys protection in the constitutions and legislative recognition in most of the States. In practice the exercise of this right is limited in many jurisdictions, including through provisions requiring the authorisation of protests, permitting the use of force in relation to unauthorised gatherings, or affording the State a wide discretion to declare a protest unlawful.

HRDs shared with ISHR the existence of significant restrictions on the holding of peaceful assemblies, demonstrations or protests, with such assemblies either effectively banned or requiring authorisation which is routinely denied and frequently dispersed using excessive force; the restrictions on access to foreign funds for NGOs; and the stigmatisation of some NGOs as foreign agents or terrorist sympathisers or supporters.

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[12] http://www.ishr.ch/sites/default/files/article/files/research_report_on_legal_environment_for_human_rights_defenderss_upload.pdf pg.13

[13] HRDs identified as key obstacles the prohibitions against, or significant legal and administrative restrictions on, the establishment of non-governmental associations, particularly those working in the field of human rights and the widespread travel bans and confiscation of passports of human rights defenders, stringent visa-requirements, and the lack of safe and speedy ways of obtaining a visa for a third country as a particular challenge aggravating their situation and rendering flexible protection measures more difficult.

[14] Article 12 of the Declaration enshrines the obligation of States to ensure that persons participating in such activities are protected from violence, threats, retaliation or discrimination. Report of the Special Representative of the Secretary-General on Human Rights Defenders, UN Doc A/61/312 (2006)

Counter-terrorism laws and measures

The extensive use of national security and counter-terrorism laws and measures to criminalise, restrict or silence the work of HRD, including through the criminalisation of speech that is protected by international law, the use of secret detention, extended detention without charge, and denial of access to lawyers, judicial review or a fair trial was a frequent issue raised by HRDs in consultations in all regions..

ISHR's comparative research similarly disclosed that laws relating to counter-terrorism and national security are increasingly being used and misused in many jurisdictions to hinder, obstruct and criminalise the work of HRD. This propensity has been recognised by this Council in a number of recent resolutions, including those relating to HRDs and the protection of civil society space.

Conclusions and Recommendations

In light of the above, ISHR urges the Human Rights Council to call upon States to:

- Develop, enact and implement a specific national law on the recognition and protection of human rights defenders.
- Enshrine the rights to freedom of expression, association and assembly in laws or the constitution.
- Recognise and protect the right to access and communicate with human rights bodies and mechanisms.
- Adopt legislative provisions to prohibit and promote accountability for intimidation and reprisals.
- Mandate and resource a human rights defender focal point within the national human rights institution.
- Establish mechanisms to protect particular groups or professionals at risk due to their human rights work.
- Specifically criminalise attacks against human rights defenders.
- Facilitate the prompt, expeditious and inexpensive establishment of human rights organisations and other NGOs.
- Support the charitable status of, and confer charitable benefits on, human rights organisations, including those which undertake advocacy.
- Enshrine the right to access and disclose information relating to human rights.
- Enact or expand whistle-blower legislation to protect human rights related disclosures.
- Codify the right to refuse to violate human rights.
- Review and amend all laws and provisions which may restrict or hinder tne work of human rights defenders.
- Decriminalise the establishment of, or participation in, unregistered associations.
- Safeguard the independence of NGOs.
- Decriminalise non-compliance with NGO registration or reporting requirements.

- Prohibit the de-registration of NGOs on vague grounds or grounds which do not accord with international human rights standards.
- Remove discriminatory restrictions on access to foreign funds and repeal requirements for NGOs receiving foreign funds to register as foreign agents.
- Repeal restrictions on the right to advocate in relation to all human rights for all persons.
- Decriminalise offences of defamation, libel, slander and similar offences.
- Decriminalise activities and the publication of materials that are prohibited on broad and vague grounds that are incompatible with international human rights standards.
- Repeal requirements as to the registration of journalists, including in order to cover protests or demonstrations, and safeguard the independence of journalists.
- Amend counter-terrorism laws to ensure compliance with international human rights standards, including the Declaration on Human Rights Defenders.
- Repeal authorisation requirements in relation to the conduct of peaceful protests and assemblies.
- Explicitly prohibit excessive use of force against protesters and assemblies.